

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KORBY V. ANDERSON (DECEASED),)
Cheryl K. Anderson, Surviving spouse,)
and Mary E. Clark, Dependent,)
Claimants)
VS.)
)
SHERWOOD CONSTRUCTION CO., INC.)
Respondent)
AND)
)
ST. PAUL FIRE & MARINE INSURANCE COMPANY)
Insurance Carrier)

Docket No. 180,136

ORDER

Respondent and its insurance carrier requested review of the Order for Penalties dated October 7, 1996, entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument on April 1, 1997, in Topeka, Kansas.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for Mary E. Clark and her conservator. Steve R. Fabert of Topeka, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board considered the transcript of hearing held before Special Administrative Law Judge William F. Morrissey on August 7, 1996, and the administrative file compiled by the Division of Workers Compensation in this proceeding.

ISSUES

This is a proceeding filed on behalf of decedent's minor stepdaughter, Mary E. Clark, seeking penalties for respondent's failure to pay compensation. The Special Administrative Law Judge assessed penalties against the respondent in the sum of \$100 per week for the period between the date of the Appeals Board's Order dated May 24, 1995, and May 14, 1996, the date the stepdaughter's demand for payment of compensation was mailed.

The respondent and its insurance carrier requested the Appeals Board to review the following issues:

- (1) Whether the Appeals Board has jurisdiction to review this second request for penalties.
- (2) Whether penalties may be assessed under K.S.A. 1996 Supp. 44-512a for nonpayment of death benefits.
- (3) Whether under K.S.A. 1992 Supp. 44-504(b) respondent and its insurance carrier are entitled to a credit to offset the workers compensation benefits awarded the decedent's minor stepdaughter to the extent of decedent's spouse's recovery in a civil claim for decedent's death.
- (4) The appropriate period for penalties to be awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Order for Penalties should be modified.

By Order dated May 24, 1995, the Appeals Board awarded the minor stepdaughter, Mary E. Clark, workers compensation benefits for the April 1993 death of her stepfather, Korby Vance Anderson. That decision was not appealed. By Order dated July 9, 1996, the Appeals Board denied a request for penalties filed by or on behalf of Ms. Clark because a conservator had not been appointed to receive the workers compensation benefits to which the minor stepdaughter was entitled. In that Order the Appeals Board determined that payment of benefits awarded the minor stepdaughter was excused until a conservator had been appointed. Also, the Appeals Board determined the conservator was the proper party to demand payment of the ordered compensation. The Appeals Board's July 9, 1996, Order has been appealed to the Court of Appeals, and that appeal is still pending.

While the first application for penalties was on appeal to the Appeals Board, on March 7, 1996, the minor's mother, Cheryl K. Anderson, was formally appointed as conservator. A second demand for compensation, which is the basis for the present review, was served upon respondent's counsel on May 15, 1996. Attached to that demand was proof of appointment of the conservator.

In addition to challenging this administrative agency's jurisdiction to adjudicate this second request for penalties, respondent contends no penalty can be assessed because respondent and its insurance carrier do not owe Ms. Clark any benefits due to a credit for the decedent's spouse's civil recovery. In the alternative, respondent and its insurance carrier contend no penalty can be assessed for late payment of death benefits.

(1) The Appeals Board finds that it has jurisdiction to consider this second request for penalties. Respondent and its insurance carrier argue that the identical issues are being raised now as were raised in the first application for penalties. Therefore, respondent contends this proceeding is in effect a rehearing of the first application which is now before the Court of Appeals. The Appeals Board disagrees with that analysis.

The Appeals Board finds that the present application for penalties involves different facts and issues than those before the Division at the time of the first application. Unlike the first application, a conservator has now been appointed for the minor stepdaughter and, as determined in the Appeals Board's earlier Order, that conservator is the proper individual to demand and receive payment of compensation. Also, because of the conservator's appointment, there appears no reason which would excuse payment of the accrued compensation.

(2) The Appeals Board finds that penalties may be assessed under K.S.A. 1996 Supp. 44-512a for failure to pay death benefits awarded under K.S.A. 1992 Supp. 44-510b. K.S.A. 44-512a provides, in part:

“(a) In the event **any compensation**, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the **employee** shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . .” (Emphasis added.)

Employee is defined under K.S.A. 1992 Supp. 44-508(b) to include the employee's dependents when the employee is deceased.

The Appeals Board finds the compensation awarded the minor stepdaughter as death benefits satisfies the definition of “any compensation” as that term is used in K.S.A.

1996 Supp. 44-512a and, therefore, the nonpayment of death benefits may serve as the basis for assessing a penalty under that statute.

(3) In its Order dated July 9, 1996, the Appeals Board determined the decedent's spouse's civil recovery could not be credited or used as an offset to reduce the benefits awarded decedent's minor stepdaughter, Mary E. Clark. That Order and determination has been appealed to the Court of Appeals. The Appeals Board's holding that the civil recovery could not be used as a credit to reduce the benefits awarded the minor stepdaughter will not be readdressed as it remains the law of the case, subject, of course, to the Court of Appeals' decision.

(4) Based upon the above, the Appeals Board finds that payment of benefits awarded Mary E. Clark was excused until such time as respondent received notice of the appointment of a conservator. The exhibits attached to the transcript of the penalties hearing held on August 7, 1996, indicates respondent's counsel received written notice of the conservator's appointment on May 15, 1996, as a copy of the Letters of Conservatorship was attached to the Demand for Compensation. Therefore, as of May 15, 1996, respondent and its insurance carrier were no longer excused from making payment of the benefits awarded Mary E. Clark under the Appeals Board's May 24, 1995, Order. The Appeals Board finds that the Special Administrative Law Judge's Order for Penalties should be modified, and that the respondent and its insurance carrier are required to pay for and on behalf of Mary E. Clark penalties in the sum of \$100 per week commencing May 15, 1996, and continuing each week thereafter until the Appeals Board's Order of May 24, 1995, is complied with and the benefits due and owing Mary E. Clark are, or were, brought current. The Appeals Board finds respondent does not owe penalty for those weeks before it received notice of the conservator's appointment because payment was excused.

(5) At oral argument before the Appeals Board the respondent raised the defense that this penalty request was not made by the minor stepdaughter's conservator. Respondent did not raise that issue before the Special Administrative Law Judge, nor was it raised in the respondent's brief to this Board.

The Appeals Board does not generally address issues that were not raised before the administrative law judges. See K.S.A. 1996 Supp. 44-555c where it states:

"The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

Nevertheless, the Appeals Board finds the circumstances support the conclusion that counsel provided demand upon respondent for payment to the minor's conservator and, therefore, proper demand for payment was made.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order for Penalties dated October 7, 1996, should be, and hereby is, modified. That respondent and its insurance carrier are hereby assessed and ordered to pay for and on behalf of Mary E. Clark penalties in the sum of \$100 per week commencing May 15, 1996, and continuing each week thereafter until such time as the benefits previously awarded Mary E. Clark are, or were, brought current.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Ronald J. Laskowski, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director